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ABSTRACT

The need for college trustees and administrators to develop better procedures and management techniques to minimize potential liability to lawsuits is addressed. A trend for seeking judicial relief on campuses and suits filed against deans, trustees, and presidents, as well as the school, are noted. Trustees need to be informed about new requirements defined by the courts and by legislation. Federal requirements are reviewed with respect to nondiscrimination, tax-exempt status, and collective bargaining; state legislation affecting institutions; constitutional requirements applied to state institutions; contractual obligations; potential liability in tort litigation; and special problems of church-related colleges. Legal responsibilities of trustees and some specific preventive measures, including participation in college goal-setting, are considered. (SW)

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Association of Governing Boards of Universities & Colleges

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Increased litigiousness is a cultural phenomenon that affects all sectors of society. Responsible trusteeship requires that a trustee must know about the legal environment in which a college must operate.

Higher education, having lost its hallowed place in our society, is no longer immune from the pressures generating litigation. Students no longer feel inhibited from seeking judicial relief for alleged wrongs that formerly were handled by judicial councils on the campus. The growth of consumer protection interests and the concern for fair practice and accountability have resulted in greater vulnerability of institutions in regard to their advertising and the quality of their educational product. Retrenchment of the academic marketplace has left some professors feeling they have little alternative to litigation if their employment is terminated. Finally, the development and refinement of federal and state legislation have given plaintiffs new bases for seeking judicial relief. A sampling of actual cases includes:

Trustees:

- Students and faculty members sue trustees for breach of fiduciary duty in the closing of a college.
- Faculty, students and dissenting trustees seek removal of trustees for mismanagement of an institution.

Administrators:

- Professor sues dean for discrimination on the basis of sex in promotion and tenure decisions.
- Tenured professor sues president for reinstatement challenging a finding of financial exigency.
- Professor sues dean for defamation in the communication of confidential personnel material.
- Criminal charges are filed against college president for misuse of federal financial aid funds.

Students:

- Medical student sues university for reinstatement after academic dismissal.
- Student sues university for failure to follow institutional policies on disciplinary dismissal.
- Student athletes sue university for fraud and breach of contract for failure to provide "an adequate college education."

Most of these cases were fully litigated and in about half of them, the plaintiffs were successful. While this list need not be a cause for excessive alarm, it should alert trustees to the need for their institutions to develop better procedures and management techniques that will minimize potential exposure to lawsuits. In short, trustees and administrators should be informed and sensitive to the new legal environment of their institutions and seek preventive legal advice.

Trustees should understand the legal environment

The changed legal environment has forced institutions and their trustees to look very closely at their campuses and to become informed about new requirements defined by the courts and by legislation. Trustees must be informed about the legal parameters within which the modern college and university must operate.

What follows is an overview of federal requirements with respect to nondiscrimination, tax-exempt status, and collective bargaining; state legislation affecting institutions; constitutional requirements applied to state institutions; contractual obligations; potential liability in tort litigation; and special problems of church-related colleges. Following examination of these problem areas, the discussion sets forth legal responsibilities of trustees and some specific preventive measures for trustees in the stewardship of their institutions.

Federal regulation

Federal obligations such as social security and fair labor standards have affected colleges and universities for a long time. The decade of the 1970s saw increasing federal activity through legislation and regulations implemented to prevent discrimination on the basis of race, sex, religion, national origin, age or handicap.

These legislative initiatives placed new responsibility on institutions to develop non-discrimination policies and procedures and in some cases, challenged long-established employment practices such as the peer review system and its subjective decision-making process. Institutions have had to meet new requirements if they were recipients of federal funds. Violation of anti-discrimination laws is very expensive; remedies include back pay, promotion, the possibility of judicially mandated tenure, and in some cases significantly altered student admission criteria and the allocation of resources for women's athletics.

New health and safety regulations affect all institutions, and for large research universities, a welter of new legal requirements has arisen in areas as diverse as research on the development of human life and the disposal of nuclear waste.

The Internal Revenue Service has begun to examine student admissions requirements, unrelated business income and the hiring of adjunct faculty members as independent contractors. The IRS recently announced its intention to audit on a two-year cycle all public charities, including colleges and universities, that have budgets or assets in excess of $10 million.

Collective bargaining was extended to the campuses of independent institutions in 1970, when the National Labor Relations Board extended its jurisdiction. Recent court decisions have clouded the issue of collective bargaining, however.[1] In certain circumstances, independent colleges may be able to assert that faculty members are not "employees" subject to collective bargaining. State laws regarding bargaining of public employees have developed in the last two decades, although in some states, faculties of state institutions do not yet have the right to bargain collectively. Nonetheless, the advent of collective bargaining has caused many institutions to revise their traditional collegial models of governance.

State Regulation

State legislation has always affected state institutions, primarily through the appropriations process. Until recently, independent colleges have been little affected; however, in a number of areas state legislation now affects independent institutions. Tuition grants are accompanied by provisions regulating their use. Legislation protecting students as "consumers" is forthcoming, as is non-discrimination legislation. State higher education coordinating agencies will have an increasing influence on the decisions of independent as well as state institutions.

State institutions and constitutional requirements

The United States Constitution prohibits governments from depriving individuals of their right to life, liberty or property without due process of law. Since constitutional proscriptions or requirements apply to the action of either federal or state governments, a state agency such as a state institution of higher education is bound by the constitutional limitation. The due process protection applies in both student disciplinary and academic dismissal proceedings, although the standards applied in academic dismissals are less stringent than in disciplinary proceedings. Although due process standards required of state institutions are not constitutionally required of independent institutions, the standards should be regarded as important guidelines

for fair treatment of students and faculty members.

Contract claims

Although constitutional due process guarantees apply only at state institutions, faculty and students at both state and independent institutions can bring claims against colleges based on alleged violations of contract. The term contract is broadly construed and can include policies written in college catalogues, faculty manuals, student handbooks, other written documents and can include unwritten norms widely accepted in the academic community. Moreover, contract language need not be explicitly stated, but a finding for a plaintiff can be based on an "implied" term of the contract. Thus, one court found that a university school of architecture had an implicit obligation to provide its students with an accredited academic program.[2]

Faculty members have successfully sued institutions for failure to follow the established personnel policies of the institution. Students have brought suits alleging that a college failed to provide the educational program that the college promised it would deliver.[3]

Tenured professors have challenged terminations for reasons of financial exigency and suits challenging termination for cause, including alleged incompetency, are beginning to surface.

Torts

Many lawsuits against institutions are based on alleged negligence, misrepresentation, or defamation. Such actions draw upon the legal theory of tort, from the Latin *tortus,* meaning twisted. Simply put, a tort is any civil wrong except a breach of contract. A typical tort action involves alleged negligence of a college resulting in injury to a student, for example, hazardous classroom activity, or a fall on an icy sidewalk, but tort theory is now being pushed into new areas. For example, suits have arisen for injuries that occur as the result of off-campus events, or for injuries to intellectual development or career caused by incompetent or careless teaching practices. Colleges are being challenged to provide safe environments for their students and must heed their duty to warn students of campus dangers, such as patterns of assault or rape. Professors have brought action alleging defamation when a college has in its written evaluation reflected unfavorably on a professor's abilities thereby potentially jeopardizing opportunities for further employment.

Special problems of church-related colleges

Some of the above topics may present special problems for church-related colleges. Non-discrimination requirements, for example, may conflict directly with a college's exercise of religious preference in hiring faculty members or in admitting students. Acceptance of public funding colors certain program decisions such as a college's requirements concerning chapel and religion courses and use of buildings funded by government loans and grants.

Some institutions have challenged the applicability of federal legislation to their institutions as an unwarranted intrusion of the state into church affairs; participation in federal unemployment insurance and the applicability of the National Labor Relations Act to faculty collective bargaining are two examples. Boards must determine to what extent perceived intervention by government truly infringes upon religious liberty; if the intervention is regarded as critically affecting the religious mission of the institution, then an appropriate challenge can be mounted.

Responsibility of trustees

What then, are the responsibilities of trustees in these situations? In general, in litigation a board of trustees is sued in its representative capacity; however,

sometimes trustees are sued individually. Even if trustees are not named as defendants, they have a responsibility to assist, guide and evaluate the institution. In two dramatic and recent cases, trustees were held to have failed to perform their fiduciary responsibilities to their institutions and were removed from their positions.

A key issue for trustees is the standard to which they are held accountable. In 1974, a Federal District Court in Washington, D.C. considered this question. Judge Gerhard Gesell in a superbly reasoned decision fashioned guidelines that should be adhered to by all trustees.[4] In the case, involving a charitable hospital, he ruled that directors of charitable institutions should be held to the corporate standard of care, which is different from the standard of care applied to trustees of a trust. Specifically, he declared that directors of charitable corporations are required to exercise "ordinary and reasonable care in the performance of their duties, exhibiting honesty and good faith." Thus, although board members are sometimes called trustees or governors, their function is similar in scope to that of a board of directors of a profit corporation.

In fact, boards of modern charitable institutions have responsibility for budgets and fund raising, manage significant amounts of property and employees, and make decisions which have social and economic impact. Thus, the emerging trend of court decisions and nonprofit corporation legislation is to hold the trustee of the nonprofit corporation to the same standard of care as that of a director of a business corporation. The legal obligations of a trustee fall into two main categories—the duty of loyalty and the duty of care to the institution.

Duty of loyalty

The trustee holds a position of public trust; in this fiduciary relationship the trustee serves the institution and the public to which the institution is dedicated. An individual trustee owes a duty of loyalty—that is, the trustee must remain loyal to the institution as a whole and claim no allegiance to a special interest group such as alumni, faculty, or outside business interests. The basic principle the trustee must observe is to avoid using the position for personal gain or advantage or to obtain favored status for a special group or business or family entity with which the trustee is affiliated.

In a decision involving a potential conflict of interest, the action by the trustee must be premised on fairness to the institution. The standard commonly used to determine fairness is whether the proposed transaction is at least as favorable to the institution as the transaction would be with an entirely different person or entity not associated with the board.

Personal liability may be imposed upon a trustee when there is a breach of the duty of loyalty. Failure to disclose a potential conflict may cause a contract to be voided by a court. If there is self-dealing by the board member and evidence of bad faith or fraud with resultant financial harm to the institution, the trustee may be held personally liable.

Duty of care

In addition to the duty of loyalty, a duty of care is owed; the trustee must act in good faith using the care and skill, common sense, and informed judgment that a reasonably prudent person would use in a similar situation. A breach of the duty of care may lead to a charge of mismanagement which can result in personal liability.

When a trustee accepts a position on a board, the trustee accepts certain responsibilities and obligations:

- to attend meetings of the board and committees;
- to examine financial statements of the institution;

- to acquire a working knowledge of institutional policies;
- to make inquiries;
- to discharge responsibilities in a reasonable, prudent and informed manner.

Can trustees be held liable?

In what situations can trustees be sued and held liable for damages? We have noted previously that trustees are often named as defendants in breach of contract cases, since they have ultimate responsibility for management of the institution. They also can be named defendants in tort claims involving allegations of negligence or defamation; and at a state institution under civil rights statutes if board members knew or should have known that an action violated the constitutional rights of a student or faculty member. When a trustee acts in a representative capacity the liability falls upon the institution, but if a trustee acts outside the representative capacity, personal liability may result. For example, a contract executed by a trustee on behalf of the institution and with institutional authority is within the representative capacity; actions by the trustee without authorization by institution bylaws or board resolution are probably personal actions.

In addition to actions brought by a particular grievant for specific injuries, sometimes actions are brought against trustees for general nonmanagement or mismanagement of an institution. In 1979, a Pennsylvania court removed certain trustees from the board of an independent college for failure to perform their duties and, in the case of one trustee, for a conflict of interest; the court also required the trustees to pay their own defense costs.[5] The trustees (defendants in the suit) had voted to close the college. Faculty, students, alumni and friends sued to reverse the decision. The court found that although the trustees had allowed the college to slide into a precarious financial position, in closing the institution they had panicked, acting precipitously and without full knowledge of the facts. This lower court decision was settled and not appealed; however, it does illustrate that trustees must perform the jobs they are elected to do and must be well informed when making decisions.

In another case, the New York board of regents ordered removal of trustees at a music school because they had allowed the president without board approval to abolish one program, decimate another, and publish a catalogue which misrepresented the courses which could be offered if the planned termination of some 25 faculty members was effectuated.[6]

Protective measures—insurance and indemnity

Trustees no longer enjoy broad immunity from legal challenge. The traditional governmental immunity for trustees at state institutions has been eroded in recent years. Thus state institutions can no longer rely on this doctrine as a bar to claims based on state law. Likewise, independent institutions that once enjoyed protection by the doctrine of charitable immunity have seen that doctrine eroded; they too must be prepared to defend in the event of a law suit.

Litigation is very expensive, even for the successful party. Such exposure and expenses are burdensome when imposed on salaried college officers or trustees who donate their time. In general, state statutes allow nonprofit corporations to indemnify directors, trustees, and officers against expenses, attorney fees and liabilities incurred because of activity undertaken on behalf of the institution, sometimes even in advance of the litigation. Typically, indemnification is allowed when the trustee has acted fairly and reasonably, but is not allowed for acts of gross or willful misconduct or in criminal actions. If an institution determines to in-

demnify trustees and officers, the board should specifically authorize such action.

Furthermore, institutions can purchase insurance to cover an obligation to indemnify officers and board members. When purchasing directors' and officers' liability insurance, the institution should take note of the costs and the limits to allowable damages provided by the policy. In examining various insurance policies, which are becoming increasingly costly to obtain, particular attention should be devoted to such facets as exclusions (libel, slander, and dishonest acts, the definition of which is constantly being enlarged), deductible amounts, and whether coverage is triggered by date of occurrence or date the claim is made and whether full disclosure of all potential claims has been made on the insurance application.

While the exposure of trustees and officers to litigation and liability is now greater than before, the standards of performance do not appear to be unreasonable. If trustees are attentive to business, exercise ordinary good judgment, and do not interfere with a president's duty to manage, a large measure of prevention will be achieved.

Trustees should use preventive law!

Although the board should refrain from becoming involved in management, four functions of a corporate board are suggested' which are applicable to the nonprofit institution as well: (1) the advisory function, by which the board "is treated as a group of management consultants, finance experts, engineers and lawyers"; (2) the disciplinary function, in which the board "can compel management to justify its proposed action"; (3) the succession function, in which the board helps to identify and recruit a new president; and (4) the function of crisis response, in which "an alert board will start to ask questions and consider shaking things up."

In the exercise of these functions, the board should pay particular attention to the following specific areas:

Board Procedures

- Each board member should avoid conflicts of interest and affiliations that might present potential conflict of interest.
- Each board member should attend board and committee meetings, examine critically financial statements, and acquire working knowledge of institutional policies.
- The board should work closely with legal counsel in identifying legal ramifications of policies affecting employment, student affairs, finance, investments and other matters. Counsel should be consulted and involved with the board and administration in the early stages of decision making.
- The board should maintain accurate and complete minutes of all board and committee meetings documenting the decision criteria and ultimate action taken by the board or the committee.

Planning:

- The board should participate with other segments of the college/university community in the development of objectives with respect to educational purpose and mission, so that decisions affecting program can be evaluated with respect to such objectives.
- It should participate in planning for the financial health of the institution and assure that adequate retrenchment procedures have been developed.
- It should develop a process for the review of recommendations made by trustees, officers and outside consultants. If recommendations are implemented or are rejected, the board should insist on full information and doc-

umentation regarding the reasons for implementation or rejection.

Faculty:

- The board should insure that criteria and procedures to be used in hiring, evaluation, promotion, and granting of tenure have been developed.
- It should review criteria and procedures to make sure they are based on reasonableness and good faith, include peer review, and provide clearly articulated appeals procedures that are applied fairly so as to forestall claims of discrimination.
- It should assure that published policies include provisions for dismissals for cause and for financial exigency. Such provisions should include definitions, guarantees of fairness, and appeals procedures.
- It should determine which policies of organizations such as the AAUP are to be included in contractual documents, and specifically, determine which of the AAUP statements on tenure and financial exigency are to be incorporated and which are to be excluded.

Students:

- The board should establish a process for the review of all documents, such as catalogues and student handbooks, which include express or implied contracts with reference to tuition, program offerings, and promises about educational output (particularly those related to future job opportunities).
- It should insure that clearly defined procedures including appeals for academic and disciplinary dismissals have been developed.
- It should insist on continuous evaluation of the institution's educational program to assure that the program lives up to promised objectives.
- It should insure that matters related to campus security are taken seriously and that a program of risk management is implemented.

Litigation has served to highlight the need for clearly articulated procedures which incorporate fairness and reasonableness. A trustee who is diligent and who acts in good faith need not be cowed by such requirements, but can view them instead as guidelines for responsible stewardship.

Footnotes

[1] *National Labor Relations Board* v. *Yeshiva University*, 63 L.Ed 2d 115 (1980).

[2] *Behrand* v. *State of Ohio*, 379 N.E. 2d 617 (1977).

[3] See, Kent M. Weeks, "Students as Consumers: Taking on the University," and "Students as Consumer—Part II, Negligence and Misrepresentation," 3 *Lex Collegii* (Spring/Summer, 1979). See also Kent M. Weeks, "They'll Be Suing You" *AGB Reports*, 36-41 (January/February, 1980).

[4] *Steam* v. *Lucy Webb Hayes National Training School*, 381 F. Supp. 1003 (D.C.D.C. 1974).

[5] *Zehner* v. *Alexander*, Court of Common Pleas, Franklin County, Pennsylvania (May 25, 1979).

[6] Mannes College, Board of Regents of the University of the State of New York (May 24, 1979).

[7] Detlev F. Vagts, "Directors: Myth and Reality," 31 *Business Lawyer* 1227.